GOVERNORS & TRUSTEES OF THE LADY TEMPLER TUBERCULOSIS FUND REGISTERED

v.

RAMPAI MUDA DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[CIVIL SUIT NO. F 22-341-1986]
2 OCTOBER 1986

CIVIL PROCEDURE: *Interlocutory injunction - Mandatory - Serious questions to be tried - Balance of convenience - Exceptional circumstances.*

CONTRACT: *Agreement for privatisation of hospital - Breach - Termination of contract - Question of trespass.*

The plaintiffs are the owner of the Lady Templer Hospital which was recommended to be privatised some time in 1984. Bids were invited and the defendant was the successful bidder in August 1984. In October 1984 the defendant was given permission by the plaintiffs to enter the said land and the Hospital in order to enable it to familiarize itself with the running and management of the Hospital and to commence renovation works.

On 11 December 1984 an agreement in writing was executed. Since the takeover date, 1 January 1985, no rental has been paid by the defendant nor was the bank guarantee or performance bond provided. Several requests by the plaintiffs for compliance with the said agreement were ignored. The plaintiffs claimed that the defendant had committed breach of the said agreement, and so the said agreement has been terminated thus putting an end to the licence granted to the defendant to occupy the Hospital and accordingly the defendant occupies the land and the Hospital as a trespasser.

This is an application by the plaintiffs for an interlocutory injunction to stop the defendant from carrying on the business of a specialized centre at the Lady Templer Hospital and to compel the defendant to deliver up vacant possession of the Hospital.

In opposing the application the defendant contended that the action is frivolous, vexatious and/or an abuse of the process of the Court and that the plaintiffs have not come to Court with clean hands in seeking an equitable remedy.

Held:

[1] In considering an application for a mandatory interlocutory injunction, the following should be considered namely, whether there are serious questions to be tried and the balance of convenience where exceptional circumstances must be shown to exist.

[2] There are serious questions to be tried in this action and the undisputed facts upon which the Counsel for the plaintiffs has relied on to show exceptional circumstances do tilt the balance of convenience in favour of the plaintiffs' application as they in the main show that the defendant is financially not at the present time in a position to run the Hospital.

[3] The proposition of Counsel for the defendant that no order of possession can be given by the Court unless a final judgment has been obtained is in the present circumstances academic in view of the uncontradicted fact that the defendant has actually ceased running the Hospital since 18 July 1986 and has to all intents and purposes abandoned it whatever the reason.

[Costs of Application to be paid by defendant to plaintiffs.]

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504
Gibb & Co. v. Malaysia Building Society Bhd. [1982] CLJ (Rep) 99
Wah Loong (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok [1975] 2 MLJ 109
Sivaperuman v. Heah Seok Realty Sdn. Bhd. [1979] 1 MLJ 228
T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd. [1985] CLJ (Rep) 312
Smith v. Inner London Education Authority [1978] 1 All ER 411
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323
Manchester Corporation v. Connolly & Ors. [1970] 1 All ER 961

For the plaintiffs - T. Thomas (A. Srinivasan with him); M/s. Skrine & Co.
For the defendant - Joginder Singh (Mohinder Kaur with him); M/s. Syarikat Joginder Singh

JUDGMENT

LC Vohrah J:

This is an application by the Governors and Trustees of the Lady Templer Tuberculosis Hospital Fund Registered ("the Trust Corporation") for an interlocutory injunction to stop Rampai Muda Development Sdn. Bhd. ("Rampai Muda") from carrying on the business of a specialist centre at the Lady Templer Hospital ("the Hospital") and to compel Rampai Muda to deliver up vacant possession of the Hospital.

The facts as disclosed by the evidence on affidavit are as follows. The Trust Corporation is the registered proprietor of some 51 acres of land held under a lease for 99 years and the owner of the Hospital and other buildings erected thereon ("the said land"). From the time of its establishment the management of the Hospital was in the hands of the Trust Corporation but the Government of Malaysia made varying degrees of monetary contributions to sustain the running of the Hospital. The Hospital was originally established as a specialized hospital for the treatment of tuberculosis but since 1970 it has actually been run as a general hospital with maternity services. Some time in 1984 the Government indicated that it would cease to subsidise the Hospital with effect from 1 January 1985 and recommended that the Hospital be run as a private hospital to provide services to the public. The Trust Corporation then took steps to invite bids from interested parties in the private sector. A special committee appointed by the Trust Corporation to consider the bids selected Rampai Muda as the successful bidder in August 1984 and in October 1984 Rampai Muda was given permission by the Trust Corporation to enter the said land and the Hospital in order to enable it to familiarize itself with the running and management of the Hospital and to commence renovation works. On 11 December 1984 an agreement in writing was executed by the Trust Corporation and Rampai Muda ("the said agreement"). Clause 1.1 of the said agreement reads:

> The Trust Corporation has agreed to transfer the management of the Hospital and to lease the Land to the company for the period commencing on 1 January 1985 to 18 June 2057 and the company has agreed to take over the management of the Hospital and to accept the lease of the Land upon the terms and conditions herein contained.

Under Clause 2.1 of the said agreement the Trust Corporation had the specific obligation:

1. To apply to the High Court for approval of the leasing of the said land to Rampai Muda and to transfer thereto management of the Hospital; and
2. To apply to the Ruler-in-Council and other relevant authorities for approval to lease the said land to Rampai Muda for use as a private hospital within the meaning of the Private Hospitals Act 1971.

Clause 3 of the said agreement stipulates that the said agreement is subject to these approvals being obtained by 31 December 1984 and provides for extension of time in the event that they are not obtained within time and for termination of the said agreement by either party upon notice being given.

Under Clause 2.2 of the said agreement Rampai Muda was under a specific obligation not to charge its interests in the said land unless certain conditions were fulfilled.

The provisions of Sub-clause 4.1 of the said agreement which form the basis of Trust Corporation's action read:

> Takover Date shall be 1 January 1985.
>
> Until the necessary approvals referred to in Clause 3 have been duly obtained and subject to the provisions of Clause 3 hereinabove mentioned, it is hereby mutually agreed that with effect from the Takeover Date the company shall pay the rent reserved by the lease and shall provide the Trust Corporation with the Bank Guarantee referred to in sub-clause 4.2(c) hereof and shall take possession of and occupy the demised premises referred to in the Lease as the licensee of the Trust Corporation on the same terms and conditions as those contained in the lease in so far as they are applicable to the company being on the land as licensee only. This situation shall continue until either this Agreement is terminated or the lease is duly executed and registered.

Sub-clause 4.2(c) reads:

> If the company had not already done so pursuant to Clause 4.1 the company shall provide the Trust Corporation with a Bank Guarantee/Performance Bond to the value of Ringgit Two Million and Five Hundred Thousand (RM2,500,000) only as security for the due performance on the part of the company to protect the Trust Corporation in the event that the company abandons or is unable to continue with the management of the Hospital. The said Bank Guarantee/Performance Bond shall be renewed and /or revised annually until such time as the Trust Corporation shall consider that the Company's operations is sufficient to cover the Hospital's expenditure.

The terms and conditions contained in the lease which are applicable appear in sub-clauses 4.(1) and 4.(8) which read:

> On the execution of this lease the Lessees shall pay the Lessors a sum equivalent to six (6) months rental amounting to Ringgit Four hundred and sixty thousand (RM460,000) as security for the due observance and performance of the stipulations terms and conditions of the Lease and the same together with the respective sums paid pursuant to sub-clause (2) of this clause hereinbelow shall be refunded to the Lessees at the expiration of the term of the lease less such sum or sums as may be due to the Lessors by virtue of the non-observance of the stipulations terms and conditions of the Lessees herein contained. [Sub-clause 4(1)]
>
> The rental for the period commencing 1 January 1985 - 31 December 1987 is Ringgit Seventy six thousand six hundred and sixty six and cents sixty seven (RM76,666.67) per month and the Lessees shall pay the Lessors the sum of Ringgit Three hundred and six thousand six hundred and sixty six and cents sixty seven (RM306,666.67) being rental for the first quarter on or before 1 January 1985. [Sub-clause 4(8)].

The Trust Corporation made the necessary application to the High Court on 14 December 1984 and obtained its consent on 2 January 1985. It also made the necessary application to the Ruler-in-Council on 5 January 1985.

By a valuation report dated 6 December 1984 prepared by C.H. Williams, Talhar & Wong Sdn. Bhd. (a firm of independent valuers agreed to by the parties) at the request of Rampai Muda, the annual market rental of the Hospital together with the said land and other buildings

thereon was valued at RM920,000. No rental has been paid by Rampai Muda since the takeover date 1 January 1985. Nor has it provided the bank guarantee or performance bond in the sum of RM2.5 million.

By letter dated 2 January 1985 (V5) the Trust Corporation through its solicitors asked Rampai Muda's solicitors to request Rampai Muda to pay *inter alia* the deposit and the rental for the first quarter of 1985 and to furnish a bank guarantee or performance bond in the sum of RM2.5 million. There was no compliance by Rampai Muda and the Trust Corporation through its solicitors on 14 February 1985 wrote directly to Rampai Muda alleging breaches of the said agreement and demanding payment. This letter (V6) reads:

By hand

TC/1m1/89964.8

14 February 1985.

Rampai Muda Development Sdn. Bhd.,
7th Floor, Bangunan Lian Seng,
Jalan Bukit Bintang,
Kuala Lumpur.

Dear Sirs,

Privatisation of the Lady Templer Hospital

We refer to the above matter.

Despite several reminders and requests to you to perform your obligations under the Takeover Agreement dated 11 December 1984 you have failed still and/or neglected to perform any of your obligations under the said Agreement namely;

You have failed to make:

1. Payment of deposit of six (6) months rentals amounting to RM460,000.
2. Payment of rent quarterly in advance amounting to RM230,000.
3. Payment of Quit Rent for 1985 without which our application to the appropriate authority for approval to lease the land to you and for you to use the land as a private hospital will not be considered.

You have not provided a Bank Guarantee or Performance Bond to the value of RM2,500,000 as security bond for due performance of the terms of the Agreement and the Lease.

Although you have offered to our clients two cheques amounting to RM152,000 in payment of the purchase of stock from our clients, one of the cheques has been issued by a third party. Our clients have requested for a covering letter enclosing the said cheques but to-date neither the letter nor the cheques have been delivered to our clients.

In view of the above breaches and/or any other breaches not specifically mentioned herein we have been instructed by our clients to inform you, which we hereby do, that if the above breaches are not remedied by 25 February 1985 vacant possession of the Hospital must be delivered to our clients before 31 March 1985.

Yours faithfully,

c.c.

1) M/s. Yuen Tang & Co.
(Attn: Mr. Kingsley Yuen)

2) M/s. Joseph Tan & Tang.
(Ref: WL. hw. 629/84)

3) Y.B. Datuk K. Pathmanaban,
Ministry of Health Malaysia,
Jalan Cenderasai,
Kuala Lumpur.

4) Datuk Wong Yoke Meng,
Ministry of Health Malaysia,
Jalan Cenderasai,
Kuala Lumpur.

5) Tun Sir Henry H.S. Lee,
Development & Commercial Bank Bhd.,
Wisma On Tai, 23rd Floor,
Jalan Ampang,
Kuala Lumpur.

As Rampai Muda did not make the payments referred to in V6, the Trust Corporation then sent the letter dated 27 February 1985 (V7) which reads:

Urgent-By Hand

TC/1m1/89964.8

27 February 1985.

Rampai Muda Development Sdn. Bhd.,
7th Floor, Bangunan Lian Seng,
Jalan Bukit Bintang,
Kuala Lumpur.

Dear Sirs,

Privatisation of the Lady Templer Hospital

We refer to the above matter and to our letter of 14 February 1985.

As you have failed and/or neglected to remedy the breaches stipulated in our said letter within the stipulated time please note that possession of the Hospital is to be delivered to our clients on or before 31 March 1985 failing which legal proceedings would be instituted without further reference thereto.

The following sums are due and payable to our clients:

1. The sum of RM230,000 being payment of rental for the months of January to March 1985.

2. The sum of RM152,000 being payment of the purchase of stock from our clients.

Further you are to settle our bill of RM40,932.70 details of which have been forwarded to you through your solicitors on 25 February.

Kindly arrange for immediate payment of the above sums failing which legal proceedings would be instituted without further reference thereto.

We will make immediate application to the Court to set aside the Court Order obtained on 2 January 1985 and will write to the Land Registry to withdraw our application to lease the land to you and to change the land use from that of a tuberculosis hospital to a private hospital.

Yours faithfully,

c.c.

1) M/s. Yuen Tang & Co.
(Attn: Mr. Kingsley Yuen)

2) M/s. Joseph Tan & Tang
(Ref: WL. hw. 629/84)

3) Y.B. Datuk K. Pathmanaban

4) Datuk Wong Yoke Meng

5) Tan Sri Dato V.M. Hutson
Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered.

6) Tun Sir Henry H.S. Lee
Vice-Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered.

Apparently on the same date that V7 was written, the solicitors for Rampai Muda wrote the letter V8 to the solicitors for the Trust Corporation in the following terms:

Our Ref: WL. hw. 629.84
Your Ref: TC/1m1/89964.8

27 February 1985.

Messrs Skrine & Co.
Straits Trading Building,
4 Leboh Pasar Besar,
Kuala Lumpur.

Dear Sirs,

Privatisation of the Lady Templer Hospital

We refer to your letter dated 14 February 1985.

We have been instructed to reply to your letter dated 14 February 1985 as follows:

(1) Our client denies that payment of the deposit of six (6) months rental amounting to RM640,000 is payable on the take-over date as alleged. Pursuant to Clause 4.1 of the Take-over Agreement ("Agreement") only rental is payable.

(2) Our client has reason to believe the valuation carried out by C.H. Williams Talhar & Wong Sdn. Bhd. on the amount of rental payable is incorrect. Our client proposes to request the said valuers to carry out a revaluation. Consequently our client shall withhold payment of rental.

(3) Our client is ready and willing to pay the quit rent for 1985 and enclose herewith UMBC Cheque No. 678077 for the sum of RM772.50.

(4) Our client has completed the renovation of the Hospital and is of the opinion that the Hospital's operation is sufficient to cover the Hospital's expenditure. As such, our client is in the opinion that the Bank Guarantee/Performance Bond is unnecessary pursuant to Clause 4.2(c) of the Agreement.

(5) Our client regrets the position adopted by your client in causing your letter of 14 February 1985 to be issued. In this respect our client refers your client to Clause 11 of the Agreement whereby it was agreed that the parties are to use their best endeavours to ensure that the Agreement would operate between the parties fairly and adequately.

(6) By reason of the maters aforesaid, our client denies that your client is entitled to vacant possession before 31 March 1985 and if necessary shall take all steps to resist any action by your client towards this end.

Strictly without prejudice to our client's rights, our client requests to have a meeting with your client on Friday, 1 March 1985 at 11.00 a.m. at Commonwealth House. At the said meeting, our client shall reply to each and every allegation made in your letter under reply and also to resolve amicably all problems to ensure a smooth and mutually satisfying completion of the Take-over Agreement.

Yours faithfully,

c.c.

1) Client

2) Y.B. Datuk K. Pathmanaban,
Ministry of Health Malaysia,
Jalan Cenderasai,
Kuala Lumpur.

3) Datuk Wong Yoke Meng,
Ministry of Health Malaysia,
Jalan Cenderasai,
Kuala Lumpur.

4) Tan Sri Datuk V.M. Hutson,
Chairman,
Board of Governors.

5) Tun Sir H.S. Lee,
Vice-Chairman.
Board of Governors.

6) Messrs Yuen Tang & Co.

Clause 11 of the said agreement referred to in the above letter reads:

Mutual Intention

The parties hereto recognise and accept that it is impracticable to provide herein for every contingency that may arise in the course of the performance of the terms and conditions contained in this Agreement and the lease and accordingly they hereby declare it to be their mutual intention that in all cases they shall each of them use their best endeavours so that this Agreement shall operate as between themselves fairly and equitably.

At the request of the Ministry of Health negotiations were entered into between the parties as evidenced by the letters V9 to V13 but the attempts at amicable settlement proved abortive. In the result the solicitors for the Trust Corporation wrote the letter dated 11 March 1986 (V14) as follows:

By hand

TC/1m1/89964.8

11 March 1986.

Rampai Muda Development Sdn. Bhd.,
7th Floor, Bangunan Lian Seng,
Jalan Bukit Bintang,
55100 Kuala Lumpur.

Dear Sirs,

Privatisation of the Lady Templer Hospital

We refer to the above matter.

Despite our notice to you dated 14 February 1985 requesting you to deliver vacant possession of the land held under Lease of State Land for Land Reserved for a Public Purpose No. 788, Lot 4433, Mukim of Kuala Lumpur to our clients on or before 31 March 1985 you are still occupying the said land as trespassers as a result of which you are liable to pay double rental with effect from 1 April 1985 in addition to the arrears of rental for the months of January, February and March 1985.

As far as rental is concerned todate you are liable to our clients for the sum of RM2,070,000 made up as follows:

Rental for the months of January to March 1985	RM 230,000.01
Double rental for the months of April 1985 to March 1986	RM1,840,000.08
	RM2,070,000.09

Please make settlement of the said sum within fourteen (14) days of this letter failing which our clients would institute proceedings against you without further reference thereto.

You shall continue to be liable to pay double rental to our clients until the date of delivery of vacant possession of the said land by you. Our clients also reserve the right to institute action against you in respect of other damages suffered by our clients by reason of the breach of the Takeover Agreement by you.

We would also like to refer to the continued use of the name 'Lady Templer' for the Specialists' Centre. The Takeover Agreement has been terminated and you are now occupying the land as trespasser. We have been instructed to inform you that the name 'Lady Templer' is not available to be used by you for any purposes and that all necessary steps should be taken by you to desist from using the name in respect of any of your activities.

Yours faithfully,

cc.

1) Tan Sri Vic Hutson, Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered.
2) Tun Sir Henry H.S. Lee, Vice-Chairman of The Board of Governors of The Lady Templer Tuberculosis Hospital Fund Registered.
3) Y.B. Datuk K. Pathmanaban.
4) M/s. Yuen Tang & Co.
(Attn: Mr. Kingsley Yuen).

There was no compliance by Rampai Muda and the upshot was the filing of the action on 17 July 1986.

To put it in one sentence, the Trust Corporation's case in this action is that as a result of Rampai Muda committing a breach of the written agreement by not paying the rental and rental deposit and by not furnishing the bank guarantee/performance bond, and consequent upon sending the letter V6, the said agreement has been terminated thus putting an end to the licence granted to Rampai Muda to occupy the Hospital, and, accordingly Rampai Muda has been occupying the said land and the Hospital as a trespasser since 1 April 1985 and must quit and deliver up vacant possession.

Rampai Muda has filed a defence and counterclaim and opposes this application. In its defence it denies that it has been in breach of the written agreement and says, *inter alia*, that it is not bound to pay any rentals or to furnish any bank guarantee/performance bond

until approval is obtained for the leasing of the said land to it and for the conversion of the said Hospital into a private hospital under the provisions of the Private Hospitals Act 1971. It also alleges that the valuation report by C.H. Williams was deliberately suppressed by the Trust Corporation at the time of the execution of the agreement and that the Trust Corporation is in breach of Clause 11 of the said agreement and that, in any event, the Trust Corporation has waived the notice of termination V6. It also alleges the existence of a collateral agreement and counter-claims for specific performance of the said agreement, for general damages for breach of contract and for special damages for monies expended and for loss suffered in not being able to manage the said Hospital. It opposes this application on the ground that the action is frivolous, vexatious and/or an abuse of the process of the Court and that the Trust Corporation has not come to Court with clean hands in seeking an equitable remedy.

I shall now consider the principles that have to be applied where an application is made for a mandatory interlocutory injunction as in this case. The general principles applicable in any application for an interlocutory injunction have been discussed at length in the now familiar and classic case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504 where Lord Diplock had this to say at p. 509:

> ... (W)hen an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at the time when *ex hypothesi* the extension of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action ...
>
> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he would not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where 'the balance of convenience' lies.

and at pp. 510 and 511:

> It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence of affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the Court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v. Duke of Buccleuch* [1865] 12 LT 628 at 629). So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
>
> As to that, the governing principle is that the Court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an

adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

I would reiterate that, in addition to those which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

From the issues that have been raised in the defence as stated above especially with regard to the interpretation of the terms of the said agreement and to the question of waiver, there can be no doubt that there are serious questions to be tried in this action so that the first test laid down in the *American Cyanamid* case has been met. Both Counsel contend that damages would not be adequate remedy to either of them in the event that the action is resolved in favour of the other. As the Trust Corporation is not a profit-making body and as its main concern is that the Hospital should function as a viable hospital, the loss or harm to the Trust Corporation, I do not think, can be measured in monetary terms. Counsel for the Trust Corporation has indicated that the Trust Corporation is prepared to give an undertaking in damages to Rampai Muda should the latter succeed at the trial and has proceeded to urge the Court to give prime consideration to the balance of convenience. I think this should be the correct approach in this case as local precedent shows. The general principles of the *American Cyanamid* case and three local authorities dealing with the issuance of interlocutory injunctions (*Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ 99, *Wah Loong (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok* [1975] 2 MLJ 109 and *Sivaperuman v. Heah Seok Realty Sdn. Bhd.* [1979] 1 MLJ 228) were considered by the Federal Court (as it then was) in the case of *T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd.* [1985] CLJ (Rep) 312. "Where an interlocutory injunction is sought" said Lee Hun Hoe, CJ (Borneo) in that case, "the balance of convenience will be the overriding consideration." The Chief Justice went on to say:

Halsbury's Laws of England, 4th Edn., Vol. 24, p. 534, para. 948 states:

A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted

The granting of a mandatory injunction is entirely discretionary. Every case must depend essentially upon its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly.

In other words before a Court decides to grant a mandatory interlocutory injunction in considering the balance of convenience exceptional circumstances must be shown to exist.

What are these circumstances which the Trust Corporation contends are so exceptional to warrant the issuance of a mandatory interlocutory injunction?

Counsel for the Trust Corporation says that these circumstances are clearly evidenced by, *inter alia*, the following facts which have not been contradicted by Rampai Muda, namely:

1) No licence has been issued to Rampai Muda under the Private Hospitals Act 1971 to run the Hospital;

2) The admission by the present Managing Director of Rampai Muda that it has been unable to seek external financing and that its internal resources are exhausted;

3) Rampai Muda has ceased running the Hospital since 18 July 1986 and the Hospital is presently being run and managed by a protem committee comprising of staff members headed by a thoracic surgeon;

4) The staff of 213 people who are carrying on work at the Hospital have not been paid salaries by Rampai Muda since May 1986 and have indicated that they do not wish to continue working with Rampai Muda;

5) EPF and SOCSO contributions paid by employees to Rampai Muda have not been paid over and charges have been preferred against Rampai Muda at the instance of the EPF Board;

6) Leasing rentals of equipment used by the Hospital have not been settled by Rampai Muda;

7) Electricity charges incurred by the Hospital have not been paid by Rampai Muda making it possible any moment and without notice for the electricity supply to the Hospital to be cut;

8) The Trust Corporation has advertised for new parties to take over the management of the Hospital and unless it is seen that Rampai Muda has been ordered by the Court to quit and deliver up vacant possession no new party will come forth and run the Hospital.

In opposing this application Counsel for Rampai Muda has urged the Court to consider several factors, amongst them: the existence of the pre-contract documents for the purpose of explaining the terms and conditions of the said agreement; the very large sums of money which have been expended by Rampai Muda since taking possession of the Hospital in October 1984; the novelty of the said agreement relating to "privatisation" of the Hospital which could not provide for all eventualities; the failure on the part of the Trust Corporation to obtain the necessary approvals referred to in Clause 3 of the said agreement; the unusual provisions of Clause 4(1) of the said agreement relating to the payment of rental and other financial obligations during the period of licence; the payment of quit rent by Rampai Muda on 14 August 1985; the question of conflict of interest in the award of sub-contracts by the former Chairman of the Board of Directors of Rampai Muda and the alleged very close association between him and the Chairman of the Trust Corporation; the requests made by Rampai Muda to have meetings with the Trust Corporation to settle the dispute in the spirit of Clause 11 of the said agreement and the latter's refusal to do so; the reason for not providing the bank guarantee/performance bond; the reason for leaving the Hospital; and the credentials and credibility of the Hospital Administrator and of the General Secretary of the Lady Templer Hospital Staff Union.

I have considered all the points that have been made by Counsel for Rampai Muda as to why the Court should not grant the orders as prayed for but, in my view, they relate to questions of fact which can only be resolved at the trial.

Counsel for Rampai Muda has also invoked the doctrine, "He who comes into equity must come with clean hands" and reverts to his contentions relating to the approvals not having been obtained, to alleged acquiescence on the part of the Trust Corporation in allowing Rampai

Muda to continue running the Hospital, and to the allegations against the Chairman of the Trust Corporation as evidence that the Trust Corporation's conduct has not been clean and fair in seeking this application. I must say again that these are matters which can only be resolved at the trial.

The undisputed facts upon which Counsel for the Trust Corporation has relied on to show exceptional circumstances, in my judgement, do tilt the balance of convenience in favour of the Trust Corporation's application as they in the main show that Rampai Muda is financially not at the present time in a position to run the Hospital. The Court also cannot ignore in this case, as the subject-matter is a hospital providing an essential social service, the plight of the patients who are undergoing treatment in the Hospital and of the Hospital staff who have not been paid but who continue working dutifully, and also the interests of the public particularly the residents in the Cheras area who must be assured of on-going hospital facilities. In my view, these are special factors affecting the balance of convenience. For authority that the interests of the public should be taken into account I refer to *Smith v. Inner London Education Authority* [1978] 1 All ER 411 and *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323. Finally, I would like to state that I have given full consideration to all the authorities and specifically to *Manchester Corporation v. Connolly and Ors.* [1970] 1 All ER 961 which Counsel for Rampai Muda has cited for the proposition that no order for possession can be given by the Court unless a final judgment has been obtained. Although Counsel for the Trust Corporation has with some merit attempted to distinguish the facts of that case where leave was (but should not have been) given for a writ of possession to issue and the facts of this case where possession is asked for only until the trial of the action, in my judgment, the proposition of Counsel for Rampai Muda is in the present circumstances academic in view of the uncontradicted fact that Rampai Muda has actually ceased running the Hospital since 18 July 1986 and has to all intents and purposes abandoned it whatever the reason. In view of all these considerations, I make an order in terms of all the prayers except that, because of the obvious typographical error in prayer (iii), the costs of this application will be paid by Rampai Muda to the Trust Corporation.

Also found at [1988] 1 CLJ 566